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UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA  
SACRAMENTO DIVISION

In re:

SK FOODS, L.P.,  
Debtor.

Case No. 09-29162

Case No. 09-02161

Chapter 11

Docket Control No. FWP-1

In re:

RHM INDUSTRIAL/SPECIALTY  
FOODS, INC., a California  
Corporation, d/b/a/ Colusa County  
Canning Co.,  
Debtor.

OPPOSITION TO SCOTT  
SALYER'S MOTION FOR  
PROTECTIVE ORDER RE  
DEPOSITION AND COUNTER-  
MOTION TO COMPEL SALYER'S  
ATTENDANCE AT DEPOSITION  
AND FOR COSTS

Date: June 24, 2009  
Time: 10:00 a.m.  
Dept: D  
Judge: Hon. Robert S. Bardwil

1 TO THE HONORABLE ROBERT S. BARDWIL, U.S. BANKRUPTCY JUDGE:

2 The Official Committee of Unsecured Creditors in the above-captioned case (the  
3 “Committee”) and Bradley D. Sharp, Chapter 11 Trustee (the “Trustee”), by and through their  
4 attorneys of record, hereby oppose Scott Salyer’s Motion for Protective Order re Deposition  
5 and move this Court for an order compelling Scott Salyer (“Salyer”) to appear and testify at  
6 his deposition on June 25, 2009 as re-noticed and for costs, including attorneys’ fees for  
7 Salyer’s failure to appear for his deposition noticed for June 22, 2009. In support of this  
8 opposition and counter-motion, the Committee and the Trustee respectfully represent the  
9 following:

10 I.

11 **BACKGROUND**

12 On June 9, 2009, the Trustee filed a Motion for Order Determining that Wastewater  
13 Discharge Agreements with Related Parties Constitute “Executory Contracts” for Purposes of  
14 11 U.S.C. §365 (the “Wastewater Motion”). The Wastewater Motion seeks a determination  
15 that the purported termination of certain agreements between the Debtors and related parties  
16 SSC Farming, LLC, SSC Farms I, LLC and SSC Farms II, LLC (collectively, “Wastewater  
17 Affiliates”) is not enforceable.

18 On June 18, 2009, this Court ordered that the Wastewater Motion is deemed to be an  
19 adversary proceeding, and set an evidentiary hearing on June 29, 2009. Because the Court set  
20 the evidentiary hearing on an expedited basis, the Court also ordered that the parties may take  
21 depositions on one business day’s notice. The Court further ordered the parties to submit  
22 testimony of cooperative witnesses by way of declaration, exchange and lodge copies of their  
23 exhibits, and separately lodge proposed findings of fact and conclusions of law all on or  
24 before June 24, 2009.

25 Pursuant to the Court’s scheduling order issued on June 18, 2009, the Trustee noticed  
26 the deposition of Salyer to take place on Monday, June 22, 2009, at 10:00 a.m. However,  
27 counsel for the Trustee was informed by Salyer’s counsel that Salyer would not appear for his  
28 deposition. Accordingly, on June 19, 2009, Stephen Dye, counsel for the Trustee, sent a letter

1 to Malcolm Segal, counsel for Salyer, asking for confirmation as to whether Salyer would  
2 appear for his deposition as noticed on June 22, 2009. A true and correct copy of Mr. Dye's  
3 letter is attached as Exhibit "A" to the concurrently filed Exhibit List in Support of Opposition  
4 to Scott Salyer's Motion for Protective Order re Deposition and Counter-Motion to Compel  
5 Salyer's Attendance at Deposition and for Costs ("Exhibit List").

6 Mr. Segal responded by letter on June 19, 2009 ("Segal Letter") that Salyer would  
7 appear for a deposition, but requested that the deposition be conducted on Thursday or Friday,  
8 June 25 or 26. However, Mr. Segal's offer to belatedly produce his client contained an  
9 unprecedented and unacceptable qualification that the Trustee's counsel provide an outline of  
10 the prospective questions so as to permit him to evaluate the proposed testimony. Mr. Segal  
11 concluded with a rather oblique statement that Salyer intends to appear, and the only question  
12 is "whether he can do so without jeopardy to his constitutional rights." A true and correct  
13 copy of the Segal Letter is attached as Exhibit "B" to the Exhibit List.

14 Mr. Dye responded that the Trustee expected Salyer to appear for his deposition as  
15 noticed. Mr. Dye further pointed out that it is not the Trustee's obligation to advise Salyer  
16 and his counsel in advance of the questions Salyer will be asked. A true and correct copy of  
17 Mr. Dye's email dated June 19, 2009 in response to the Segal Letter is attached as Exhibit "C"  
18 to the Exhibit List.

19 On Sunday evening, less than 24 hours before Salyer's deposition was scheduled to  
20 commence, Salyer filed a motion seeking an order that Salyer's deposition should not occur  
21 on June 22, 2009 as noticed, but instead should occur, if at all, on June 25 or 26, 2009. In  
22 addition, Salyer's motion requests an order requiring the Trustee to provide Salyer's counsel  
23 with an outline of his prospective questioning at the proposed deposition on or before June 24,  
24 2009.

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1 II.  
2 **COSTS, INCLUDING ATTORNEYS' FEES SHOULD BE AWARDED FOR**  
3 **SALYER'S FAILURE TO APPEAR FOR HIS DEPOSITION AS NOTICED ON JUNE**  
4 **22, 2009**

5 As noted above, the Court ordered that the parties may take depositions on one  
6 business day's notice. The Trustee properly noticed Salyer's deposition in accordance with  
7 the Court's scheduling order. Filing a motion for protective order does not excuse Salyer  
8 from appearing at his deposition. "[I]t is for the court, not the deponent or his counsel, to  
9 relieve him of the duty to appear." Pioche Mines Consol., Inc. v. Dolman, 333 F.2d 257, 269  
10 (9th Cir. 1964).

11 Salyer is the key witness in this adversary proceeding. At the time that the agreements  
12 at issue in this adversary proceeding were purportedly terminated, Salyer controlled both the  
13 Debtors and the Wastewater Affiliates. In other words, Salyer controlled the parties on both  
14 sides of the agreements. Further, as alleged in the Wastewater Motion (deemed to be the  
15 complaint), the sequence of events leading up to the purported termination of the agreements  
16 suggests that the termination may have been motivated by Salyer's desire to leverage a  
17 favorable deal for himself. In addition, Salyer, as manager of several of the Wastewater  
18 Affiliates, has taken the position that the agreements are not executory because of the  
19 purported termination. It was therefore vital that the Trustee and the Committee have an  
20 opportunity to depose Salyer prior to the June 24, 2009 deadline to lodge proposed findings of  
21 fact and conclusions of law.

22 If the Court does issue an order continuing the deposition to June 25 or 26, it is not at  
23 all clear that Salyer will actually appear for deposition on the later date. Rather, several  
24 statements in the Segal Letter and in the motion for protective order suggest that Salyer may  
25 yet refuse to appear based upon his Fifth Amendment privilege. See Exhibit B (questioning  
26 whether Salyer can appear for deposition without jeopardizing his constitutional rights); Scott  
27 Salyer's Motion for Protective Order Re Deposition, pp. 1-2 (requesting order that the  
28 deposition scheduled by the Trustee should not occur on June 22, "but should instead occur, if

1 *at all*, on June 25 or 26, 2009”) (emphasis added).

2 The Segal Letter badly misstates the issue of Salyer’s Privilege by posing the false  
3 question of “. . . whether he [Salyer] can do so without jeopardy to his constitutional rights”  
4 Segal Letter, Last Sentence. There is no threat or jeopardy to Salyer’s Fifth Amendment  
5 rights. His right against self-incrimination will be absolutely honored. Counsel for the  
6 Trustee and Committee recognize that Salyer may invoke his Fifth Amendment privilege to  
7 any question he wishes. Neither the Trustee nor the Committee pose any threat to Salyer’s  
8 constitutional rights.

9 The law is clear that Salyer must appear for his deposition, regardless of whether he  
10 anticipates invoking the Fifth Amendment privilege in response to some of the questions. See  
11 Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1263 (9th Cir.2000).

12 If Salyer invokes his Fifth Amendment privilege, the parties have a right to  
13 incorporate this fact (and the consequences thereof) into the papers they submit to the Court in  
14 advance of the evidentiary hearing. The Trustee and the Committee therefore have a right to  
15 depose Salyer prior to the June 24, 2009 deadline to submit papers to the Court. This  
16 opportunity is now lost and will be discussed at the June 24, 2009, hearing.

17 If a party fails to appear for deposition, sanctions may be imposed even in the absence  
18 of a prior court order. Fed. R. Civ. Proc. 37(d)(1)(A)(i); Henry v. Gill Industries, Inc., 983  
19 F2d 943, 946-947 (9th Cir. 1993). Further, unless the failure to appear at deposition was  
20 substantially justified or other circumstances make an award of expenses unjust, a court must  
21 require the party failing to appear at deposition, the attorney advising that party, or both to  
22 pay the reasonable expenses, including attorney’s fees, caused by the failure. Fed. R. Civ.  
23 Proc. 37(d)(3). Salyer failed to appear for his properly noticed deposition. He had no  
24 substantial justification for his failure to appear.

25 Accordingly, the Committee and the Trustee respectfully request that the Court issue  
26 an order compelling Salyer to appear and testify at his deposition on June 25, 2009 as re-  
27 noticed and for costs, including attorneys’ fees for Salyer’s failure to appear for his deposition  
28 noticed for June 22, 2009.

1 III.

2 **SALYER IS NOT ENTITLED TO AN OUTLINE OF QUESTIONS IN ADVANCE OF**  
3 **HIS DEPOSITION**

4 Under the guise of a motion for protective order, Salyer requests that the Court order  
5 the Trustee to provide Salyer's counsel with an outline of his prospective deposition  
6 questions, for the purported purpose of assisting Salyer's counsel in evaluating whether the  
7 deposition sought by the Trustee will implicate Salyer's Fifth Amendment privilege. There is  
8 no legal basis for requiring the Trustee to provide an outline of his prospective deposition  
9 questions. Nor does Salyer need such an outline to evaluate whether and how to assert the  
10 Fifth Amendment privilege.

11 Deposition questions may relate to "any nonprivileged matter that is relevant to any  
12 party's claim or defense..." Fed. R. Civ. Proc. 26(b)(1). The complaint in this adversary  
13 proceeding contains an extensive statement of the facts upon which the Trustee bases his  
14 claims, including Salyer's alleged involvement and motives. Salyer and his attorneys  
15 therefore need only review the complaint to know the topics that may be covered at Salyer's  
16 deposition. Salyer and his attorneys do not need an outline of the deposition questions to  
17 consider the potential Fifth Amendment issues that may arise at the deposition.

18 From his motion, it is clear that Salyer has, in fact, already determined that the  
19 deposition may implicate his Fifth Amendment privilege. Thus, the only reason for the  
20 requested outline of deposition questions is so that Salyer and his counsel can decide in  
21 advance of the deposition exactly how to answer each question. That is not the way a  
22 deposition works.

23 Salyer cites no authority requiring a party to provide a deponent with an outline of the  
24 prospective questions in advance of a deposition. No such authority exists because, regardless  
25 of the potential Fifth Amendment issues, it is not the Trustee's duty to lay out his deposition  
26 questions to Salyer in advance of the deposition. Rather, Salyer must appear at his deposition  
27 and decide on a question by question basis whether to assert the privilege. See Doe ex rel.  
28 Rudy-Glanzer v. Glanzer, supra, 232 F.3d at 1263 (stating that "[t]he only way the privilege

1 can be asserted is on a question-by-question basis, and thus as to each question asked, the  
2 party has to decide whether or not to raise his Fifth Amendment right”); Garcia-Quintero v.  
3 Gonzales, 455 F.3d 1006, 1019 (9th Cir. 2006) (same); U.S. v. Feldman, 324 F.Supp.2d 1112  
4 (C.D. Cal. 2004). Moreover, Salyer must claim the Fifth Amendment privilege personally  
5 rather than through counsel. See Garcia-Quintero, supra, 455 F.3d at 1019.

6 For example, in Feldman, the defendant who had been ordered to appear for a  
7 judgment debtor examination under Rule 69 and California Code of Civil Procedure §  
8 708.110, filed an ex parte application for a protective order contending, among other things,  
9 that the judgment debtor examination would violate his right against self-incrimination.  
10 When the defendant did not appear for the examination, the court converted the ex parte  
11 application to a motion. Feldman, supra, 324 F.Supp.2d at 1115. In a published opinion, the  
12 district court denied the defendant’s motion for a protective order, holding that the  
13 defendant’s attempt to assert a blanket self-incrimination privilege was not acceptable. Id. at  
14 1119. The court stated that the defendant must “present himself for questioning, and as to  
15 each question elect to raise or not to raise the defense.” Id. (quoting United States v.  
16 Drollinger, 80 F.3d 389, 392 (9th Cir. 1996).)

17 Salyer is not entitled to the requested outline for an additional reason. An attorney’s  
18 deposition outline is created in preparation for trial. It necessarily reveals the attorney’s  
19 strategy and thoughts on what information to seek from a witness, and how to best obtain that  
20 information. As such, it is work product and is protected from disclosure. See Fed. R. Civ.  
21 Proc. 26(b)(3)(A); Hickman v. Taylor, 329 U.S. 495, 510-511 (1947).

22 The fact that Salyer anticipates asserting the Fifth Amendment privilege at his  
23 deposition does not give him the right to an advance peak at the Trustee’s deposition  
24 questions. If a party was required to provide an outline every time the deponent raised the  
25 Fifth Amendment as an issue, every deponent would always claim that he or she needs such  
26 an outline to consider possible Fifth Amendment objections. Such a rule would defeat the  
27 very nature of a deposition by allowing every deponent to carefully craft answers in advance  
28 of his or her deposition.

1 For the foregoing reasons, the Committee and the Trustee respectfully request that the  
2 Court deny Salyer's request for an order requiring the Trustee to provide Salyer's counsel  
3 with an outline of his prospective deposition questioning.

4 IV.

5 **CONCLUSION**

6 For all of the foregoing reasons, the Committee and the Trustee respectfully request  
7 that the Court deny Salyer's motion for a protective order in its entirety, and issue an order  
8 compelling Salyer to appear and testify at his deposition on June 25, 2009 as re-noticed and  
9 for costs, including attorneys' fees for Salyer's failure to appear for his deposition noticed for  
10 June 22, 2009.

11 DATED: June 23, 2009

DOWNEY BRAND LLP

12  
13 By: 

R. DALE GINTER

Attorneys for Official Committee of Unsecured  
Creditors

14  
15  
16 DATED: June 23, 2009

SCHNADER HARRISON SEGAL & LEWIS

17  
18 By: 

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